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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1605

RICHARD NIXON,

Appellant,

—v.—

ADMINISTRATOR OF GENERAL SERVICES, *et al.*,

Appellees,

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *et al.*,
JACK ANDERSON, LILLIAN HELLMAN, *et al.*,

Intervenor-Appellees.

BRIEF FOR INTERVENOR-APPELLEES, LILLIAN HELLMAN, *et al.*

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* The intervenor-appellees include Lillian Hellman, John Hersey, Telford Taylor, Robert Silvers, Norman Dorsen and four other members of the executive board of the Committee for Public Justice, a group of writers, lawyers, historians and others concerned about the civil rights and liberties of the American people.

OPINIONS BELOW

The opinion of the three-judge court (J.S. App. 1-106a)[1] is reported at 408 F. Supp. 321. The opinion of Judge Richey in the "consolidated cases" (discussed below) is reported sub nom. Nixon v. Sampson, at 389 F.Supp 107 (D.D.C. 1975), judgment stayed, 513 F.2d 427 and 430 (D.C. Cir. 1975) (J.S. App. 139a-202a). The latter opinions also deal with the convening of the three-judge court below.

JURISDICTION

The judgment of the three-judge court was entered on January 7, 1976. A notice of Appeal was filed on March 4, 1976 and appellant's jurisdictional statement was filed May 3, 1976. This Court noted probable jurisdiction on November 29, 1976. The jurisdiction of this Court rests upon 28 U. S.C. §1253.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article IV, Section 3, Clause 2 of the Constitution.

The First and Fourth Amendments to the Constitution.

Title I of the Presidential Recordings and Materials Preservation Act, 88 Stat. 1695

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1. "J.S. App." refers to the Appendix to the Jurisdictional Statement.

et seq., 44 U.S.C. §2107 note and §§3315-3324 (Sup. IV, 1974) is set out in Appendix I to Appellant's Brief.

QUESTIONS PRESENTED

1. Does Congress have the constitutional power to enact legislation broadly preserving from destruction 42 million documents and various tape recordings of the Executive branch in order to insure continuity of government, preserve an accurate historical record and provide public access to government records showing possible abuse of power by an ex-President.

2. Does an ex-President have an expectation of privacy with respect to governmental records he never saw or to other governmental records showing his use of governmental power.

3. Does the fact that, contrary to regulations, an ex-President intermingled a tiny fraction of personal papers with a vastly greater quantity of records bearing on the performance of public duties and the exercise of governmental powers entitle that ex-President to exclusive personal custody and control over all such records.

4. Is the Presidential Recordings and Materials Preservation Act unconstitutional as an invasion of an ex-President's Fourth and First Amendment rights despite the fact that all private papers relating to his personal affairs or the exercise of First Amendment rights will be returned to him and will not be made public.

5. Can professional archivists, expert and experienced in screening and properly classifying government and archival records, be legitimately entrusted with the task of sorting out private materials of Mr. Nixon and returning them to him.

STATEMENT OF THE CASE

A. Background to This Action

Former President Richard M. Nixon resigned his office on August 9, 1974 following various disclosures about his role in the Watergate affair that would almost assuredly have meant his impeachment and removal from office. A month later, on September 8, 1974, Mr. Nixon signed an agreement with the then Administrator of General Services, Arthur F. Sampson, purporting to grant Mr. Nixon ownership and possession of 42 million documents collected by the White House in the five and one half years of his Presidency. In addition, 880 tape recordings of conversations (covering the period from February, 1971 to July, 1973) occurring in his two White House offices, in his study at Camp David and on some of his telephones (App. 218) were also covered by the agreement. The agreement allowed Mr. Nixon to destroy all the documents involved after September, 1977 and all the tapes after September, 1979 or at the time of his death, whichever first occurred.

One reason for the transfer was later offered by former Presidential counsel Philip W. Buchen. He noted that after August 9, 1974, the White House was forced to respond to many subpoenas and requests for access to the Nixon Presidential materials, and White

House officials found that continued custody of the Nixon Presidential materials was "quite burdensome." Deposition of Philip Buchen, Nixon v. Sampson, Tr.I at 11.

Shortly after the agreement was signed, the Watergate Special Prosecutor protested, claiming that the material covered by the Nixon-Sampson agreement was needed by his staff for its investigations. As a result, the Ford administration refused to implement the Nixon-Sampson agreement. Mr. Nixon then brought suit on October 17, 1974 to enforce the agreement and obtain the materials. (Nixon v. Sampson, C.A. No. 74-1518, D.D.C. filed October 17, 1974). Thereafter, the Reporters Committee for Freedom of the Press and other professional organizations and individual reporters, historians and writers brought suit to invalidate the agreement. (Reporters Committee for Freedom of the Press v. Sampson, C.A. No. 74-1533, D.D.C. filed October 21, 1974). In addition, Lillian Hellman and other writers, lawyers and historians belonging to the Committee for Public Justice brought an action under the Freedom of Information Act to secure access to certain tapes in the Nixon materials and to test the validity of the Nixon-Sampson agreement. (Hellman v. Sampson, C.A. No. 74-1551, D.D.C. filed October 24, 1974). Jack Anderson, the newspaper columnist, intervened in the Nixon v. Sampson case as did the Special Prosecutor. The three cases were then consolidated and have been called the "consolidated cases" throughout this litigation.

While various motions were pending in the consolidated cases, Congress passed the law at issue here, the Presidential Recordings and Materials Preservation Act, (hereafter "the Act"), P.L. 93-526, 88 Stat. 1695 (Decem-

ber 19, 1974). On the following day Mr. Nixon filed this action seeking declaratory and injunctive relief against enforcement of the Act on a variety of constitutional grounds. The Reporters Committee, Jack Anderson and Miss Hellman, et al., moved to intervene in light of their FOIA claims in the consolidated cases.

Thereafter, on January 31, 1975, Judge Richey handed down his opinion in the consolidated cases, Nixon v. Sampson 389 F.Supp. 107 (D.D.C. 1975), stating that former President Nixon did not own the Presidential materials covered by the Nixon-Sampson agreement and that only the current President and not any former President could assert executive or presidential privilege with respect to communications contained in the materials. On petition for a writ of mandamus, the Court of Appeals for the District of Columbia stayed entry of any order in Nixon v. Sampson, until the district court passed upon the application for a three-judge court in the instant action. Nixon v. Richey, 513 F.2d 430 (D.C. Cir. 1975). Thereafter the stay was continued, not because any appeal court or later district court disputed any of Judge Richey's conclusions, but only because the court of appeals held that an action challenging the constitutionality of the Act had to take precedence over the consolidated cases.

In May, 1975, the court below determined it was properly convened, continued the stay in the consolidated cases, granted the pending motions for intervention and established a briefing and argument schedule (App. 123-5). The case was argued on September 25, 1975, and decision handed down on January 7, 1976.

B. The Act

Section 101 of the Act directs the Administrator of General Services to obtain and retain possession and control of all of the presidential historical materials and tape recordings from appellant's administration. Mr. Nixon's agreement with GSA is abrogated (Section 101(b)). Section 102(b) provides that these materials and recordings shall be made available for use in any judicial proceeding, "subject to any rights, defenses, or privileges which the Federal Government or any person may invoke * * *." Section 102(c) and (d) provides that Mr. Nixon (or his designate) and the Executive Branch shall have access to the materials, subject to the Administrator's regulations.

Section 103 requires the Administrator to issue regulations to govern custody of and access to the materials. Section 104 requires the Administrator to issue regulations providing "public access" to the materials; these regulations must "take into account" seven factors (Section 104(a)):

> (1) the need to provide the public with the full truth, at the earliest reasonable date, of the abuses of governmental power popularly identified under the generic term "Watergate";
>
> (2) the need to make such recordings and materials available for use in judicial proceedings;
>
> (3) the need to prevent general access, except in accordance with appropriate procedures established for use in judicial proceedings, to information relating

to the Nation's security;

(4) the need to protect every individual's right to a fair and impartial trial;

(5) the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege which would prevent or otherwise limit access to such recordings and materials;

(6) the need to provide public access to those materials which have general historical significance, and which are not likely to be related to the need described in paragraph (1); and

(7) the need to give to Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need described in paragraph (1) and are not otherwise of general historical significance.

Section 104(b) requires the Administrator to submit the "public access" regulations and any subsequent changes in them to both Houses of Congress and provides that the regulations or changes can be disapproved by a resolution of either House within 90 legislative days of submission.[2] Section 105 pro-

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2. The Administrator has submitted to Congress three sets of "public access" regulations. The first set was disapproved by the Senate. S. Res. 244, 94th Cong., 1st Sess. (1975); 121 Cong. Rec. S15803-S15808 (daily ed. September 11, 1975). The Administrator has not sought to enforce these disapproved regulations, and no party to this litigation claims any rights under them. The second set was withdrawn; the Senate disapproved seven provisions of those regulations, believing that the Administrator lacked power to withdraw them. S. Res. 428, 94th Cong., 2d Sess. (1976); 122 Cong. Rec. S5290-S5291 (daily ed. April 8, 1976). The third set was submitted on April 13, 1976, and is pending.

Regulations implementing Sections 102 and 103 of the Act are not required to be submitted to Congress. These regulations were published on January 14, 1975. 40 Fed. Reg. 2669; 41 C.F.R. 105-63. The district court has enjoined the effectiveness of some of these regulations pending disposition of this case (J.S. App. 107a-108a).

vides for "just compensation" to any individual who may have been deprived of private property by the Act.

Title II of the Act establishes a National Study Commission to study and recommend procedures regarding the control, disposition, and preservation of the records of all federal executive, judicial, and legislative officers. The National Study Commission has been appointed, has held hearings, but has not yet submitted its report; it is not involved in this litigation.

C. The Decision Below

The court below considered the validity of the Act on its face, in light of the fact

that final regulations had not yet been promulgated and accepted by Congress and that Mr. Nixon has the right of judicial review of the regulations when adopted. Thus, the court concluded, the only interest of Mr. Nixon that could be endangered by the Act itself is the necessity of screening of the materials by professional archivists once the regulations come into force. The court found that the Act by its own force does not require public disclosure of any particular document or tape and that the regulations when adopted might eliminate any intrusion into constitutionally protected rights. Thus, it held that the governmental interests justifying the Act outweighed the hypothetical dangers to Mr. Nixon's interests.

The court rejected Mr. Nixon's argument that the Act invaded the separation of powers between the three branches of government. The only prerogative of the Executive branch that could conceivably be affected here is the possible threat to confidentiality in rendering advice to the President. But this interest could involve only a tiny percentage of the materials at issue here (Mr. Nixon admitted that he had personal involvement in only about 200,000 of the 42 million documents covered by the Act. App. 516). The court did not reach the question of whether an ex-President can claim executive or presidential privilege. But assuming there is some privilege, the court said it is not as forceful as one raised by an incumbent President. Given the fact that only a small percentage of the 200,000 documents and not all of the tapes would qualify for the type of limited privilege which might exist in this situation, the danger to confidentiality from the limited screening by archivists that might be involved

could not significantly invade the separation of powers. Such screening has been done for almost all the Presidential libraries since Herbert Hoover's time. The court concluded that the interests of Congress in maintaining a complete and accurate historical record and assuring the continuity of government records for those now in the White House more than outweighed any interest of Mr. Nixon's.

The court below also rejected any Fourth Amendment claim of Mr. Nixon based on his expectation of privacy in the bulk of the materials. If Mr. Nixon saw only 200,000 documents the court said "we find it difficult to believe that more than a tiny fraction of them contain materials which Mr. Nixon reasonably expected to be private." (J.S. App. 69a) Similarly, tape recordings in the two White House offices and his study at Camp David must "relate primarily to the conduct of the presidency." (J.S.App. 71a) Thus his privacy interest in the tapes must be quite small. Although it was likely that some of Mr. Nixon's private conversations may be screened by archivists, the lower court found that no Fourth Amendment violation would occur because such a search would be "reasonable." (J.S. App. 87a) The court noted that many private conversations are "seized" under Title III of the Omnibus Crime Control and Safe Streets Act when a wiretap is installed on a private telephone. The fact that some invasions of personal privacy occur which are unrelated to criminal activity that served as the basis for a warrant has been held not to render a wiretap unreasonable under the Fourth Amendment. (J.S. App. 79a-81a) The court also noted that administrative searches do not have all the protections of searches under the criminal law. (J.S. App. 75a, n.56)

Mr. Nixon's First Amendment claims were also found to be without foundation. Even with the broadest possible definition of his rights in this area, the court found that the limited intrusion by archivists will not impair Mr. Nixon's right to express himself in public or to associate with others in political activity. (J.S. App. 89a-93a)

Finally, Mr. Nixon's equal protection claim and his bill of attainder argument were also rejected by the court below. The court found that the papers of all of Mr. Nixon's predecessors as President had already been deposited in government libraries. (And since that decision, Mr. Ford has continued the tradition by donating all his papers to the government even before he left office, so there was continuous federal control of the documents of his presidency. See 12 Weekly Compilation of Presidential Documents, 1709-18 (December 20, 1976)). Since his papers "were in a unique status," (J.S. App. 93a) Congress could legislate with respect to them without violating the equal protection or bill of attainder clauses.

D. Materials at Issue

The materials involved in this litigation include all the 42 million documents and records sent to, collected in or generated by the White House under President Nixon from January 20, 1969 to August 9, 1974. Mr. Nixon informs us that a major portion of this material -- 7.3 million pages -- consist of birthday, anniversary and other greetings to Mr. Nixon and his family, public opinion mail and extra sets of GPO publications. (Appellant's brief at 25) Another large group of

documents -- 11.4 million pages -- are duplicates of communications among the Executive departments and permanent copies are still to be found in the files of the State Department, Treasury Department and so on. Of the 24 million documents remaining, only 200,000 were personally reviewed by Mr. Nixon. (App. 516) The other documents consist of the work product of the White House for five years, virtually the entire range of activity of the Executive branch of government. These would include the files of the various components of the Executive Office: the National Security Council, the Domestic Council, the Economic Policy Board, the Energy Resources Council, and the Council on International Economic Policy, as well as material from some of the other organizations such as the Council of Economic Advisers, the Office of Management and Budget, and others. (Affidavit of William Matthews, App. 398-99)

Mr. Nixon seeks to create the impression that the institutional files of the various components of the Executive Office of the President contain duplicates of the bulk of the material involved in this suit. Thus he says: "Even within the Executive Office of the President...the files are retained from one administration to the next." (Appellant's brief at 27) This statement is totally misleading. Jeanne Davis, Staff Secretary of the National Security Council, testified that there are both institutional files and Presidential files. The institutional files contain formal materials -- NSC precedential documents, documents dealing with NSC institutional continuity, and documents dealing with the decision-making processes of NSC. (J.S. App. 8a, n.1) Mr. Nixon's Presidential NSC files contained the most sensitive and

important substantive documents (App. 701) such as Presidential conversations (App. 699) or correspondence with Heads-of-state (App. 680). Over 350 boxes of Presidential material from the NSC are involved in this action. (App. 706) Because of the White House need for access to some of this material which was not found in the institutional files of the NSC, 25 boxes of Nixon presidential material were copied, and used by the Ford administration. (App. 705)

Also involved are the 880 tape recordings of conversations in the two White House offices and the President's study at Camp David, as well as on telephones in these places and the Lincoln Sitting Room of the White House. These tapes necessarily involve conversations relating "primarily to the conduct of the presidency." (J.S. App. 71a)

INTRODUCTION AND SUMMARY OF ARGUMENT

There are five parties to this action and the legal arguments on all sides have become complex and voluminous. To relieve this Court from being exposed to repetitious argument in five separate briefs, this brief will focus upon Mr. Nixon's civil liberties arguments, leaving other points to other parties to answer.

We note at the outset our own concern that Congress and this Court should not establish any rule of law in dealing with Mr. Nixon that would have a restrictive effect upon the rights and liberties of American citizens. Thus we agree with Mr. Nixon that his First Amendment rights as a citizen should be given the widest protection. We fully

expect at a later time to press for an expansive definition of his constitutional rights in this area when regulations are finally adopted under this law. We agree that his right to privacy and his Fourth Amendment rights should not be narrowly confined. We agree that the reasoning of the court below on these points was inadequate in a number of respects. For example, we question the wiretap analogy adopted by the lower court as a justification for rejecting Mr. Nixon's Fourth Amendment claims. (J.S. App. 79a-83a) We also cannot accept the court's reasoning on the narrow scope of protection under the Fourth Amendment for administrative searches. (J.S. App. 75a, n.56) We also believe that the constitutional right to privacy is more broadly based than the court below indicated. (J.S. App. 68a, n.51)

Nevertheless, we believe that the lower court reached the correct result in upholding the validity of the Act. We believe that Congress exercised its proper constitutional power in this instance for the following interrelated reasons.

POINT I

The Act does not presently infringe upon any of Mr. Nixon's constitutionally protected interests. He is not the owner of the materials at issue -- they are government records constituting the business of the Executive branch for five years. Some are needed for the ongoing business of government. There has been no unbroken tradition of private ownership of presidential materials, and even if such a pernicious tradition had existed, it should not be given legal recognition. In

any event, a new tradition has emerged, investing these papers with a public interest so that every ex-President has immediately reconveyed them to the United States. Congress has broken whatever tradition used to exist on private ownership by passage of the Federal Records Act and the Freedom of Information Act, broadly preserving all government records and making many of them subject to public access. The Act is another example of that legislative effort.

In addition, the Act does not mandate public access to any particular document. It requires that all of Mr. Nixon's private materials be returned to him.

There is no significant immediate impact on Mr. Nixon's rights. He left the materials in the possession of GSA when he left office and the Administrator may retain possession until all the legal issues are resolved. Mr. Nixon has unrestricted access to the materials now. He may assert any constitutionally based right or privilege to any subpoena -- and has done so. If he has any presidential privilege to assert -- which we dispute -- he can assert it and the Act makes no change in the law on presidential privilege. The final regulations may solve any of his legitimate constitutional problems.

The definitions required to be made by the Act -- between governmental and private papers -- can be resolved by existing statutory and regulatory provisions. In fact, Mr. Nixon was obliged by regulations in force during his entire administration to segregate personal papers. Had he done so, the screening process would have been easier and less likely to create problems that he is now citing against the Act. Professional archivists are experienced in making the proper classifications and regularly screen sensitive materials in order to do this task.

POINT II

Nor are Mr. Nixon's Fourth Amendment rights compromised in any way. He never had any reasonable expectation of privacy in materials reflecting and constituting the ongoing business of government. No government official has a constitutional right to resist official inquiry into his conduct of government affairs, except under the Fifth Amendment which does not apply in this case. The Freedom of Information Act is a clear model for the present Act, showing that government officials do not have a reasonable expectation of privacy in their governmental materials since Congress could always provide for greater access than existed at the time the records were created. In addition, final regulations may in fact provide for restrictions on access in the same way that the FOIA provides for specific exemptions on disclosure.

Mr. Nixon's reasonable expectation of privacy in his private papers will be respected. Congress could legitimately provide for screening by professional archivists, since they have the experience and detachment necessary to fulfill the requirements of the Act. The materials are in the Administrator's lawful possession. Mr. Nixon's inconsistent claims with respect to the materials and his past reluctance to reveal materials relating to alleged Watergate abuses led Congress to conclude that professional review was necessary.

The tapes create special problems since they would be more private and intimate; but they are also the most important materials to fulfill certain objectives of the Act. Congress did not want them destroyed since they could reveal important information about the Watergate affair which so endangered confidence in our democratic system. They are also needed for ongoing judicial proceedings and may have information of general historical interest. (However, proposed regulations will provide for exemptions against disclosure similar to those in the FOIA.) Once again Congress acted reasonably in providing for professional screening of the tapes in view of Mr. Nixon's past experience with them and the need for preserving their integrity. Finally, regulations may respect Mr. Nixon's privacy by avoiding word-by-word review in accordance with various suggestions made by the lower courts.

POINT III

Mr. Nixon's First Amendment rights are not infringed upon by the Act. His personal First Amendment rights as a citizen are recognized by the Act and are given force by the regulations. To the extent that his political activities with the Republican party are protected by the First Amendment, they will also be protected against disclosure. There is also a strong First Amendment interest in the people knowing how the affairs of their government are conducted, especially with respect to the Watergate abuses.

ARGUMENT

POINT I

THE ACT DOES NOT PRESENTLY IMPLICATE ANY OF MR. NIXON'S CONSTITUTIONALLY PROTECTED INTERESTS

The overwhelming question on this appeal is whether Mr. Nixon should be allowed to keep 42 million documents generated during his presidency and 880 tapes reflecting his exercise of power because he failed to segregate his private materials properly and therefore government archivists in reviewing this material might be exposed to a small quantity of private documents or conversations. At this stage of the proceedings, the Act does not mandate public access to any particular document. Although Mr. Nixon refers at times to the danger of public disclosure, the constant refrain throughout his brief is that the screening and review by government archivists will injure him by undermining confidentiality in the Presidential office and by violating his constitutional rights. In short, he is trying to point to alleged problems in the screening process (which has not yet been finalized) as a spring board to justify his custody of all 42 million documents and tapes.

It is important to note the steps of the reasoning behind Mr. Nixon's claim.

First, Mr. Nixon assumes that he was the "owner" of all the materials covered by the Act, including documents which he never saw or knew anything about and which reflected the on-going business of government.

Second, Mr. Nixon assumes throughout his brief that there will be immediate public access to his truly personal and private documents. Thus he says: "the extraordinarily broad sweep of Section 101 brings within its coverage every possible piece of Nixon memorabilia, whether or not there is a legitimate national interest in examining it and subjecting it to public disclosure." (Appellant's brief at 123) Later he notes: "The effect of such examination and disclosure is felt directly by the appellant, as an individual whose expression is, by government fiat, seized and held up for microscopic public scrutiny." (Id. at 168)

Third, he assumes that no set of regulations possibly issued by GSA could solve his constitutional arguments and protect his privacy concerns: "the two reports issued to date by the Administrator, together with his proposed regulations, demonstrate that it is 'virtually a certainty' that the extraordinary protective regulations conceived of by the court below are remote from the Administrator's mind." (Id. at 48)

Fourth, he assumes that it is impossible or very difficult to make the classifications required by the Act: "the question will still remain as to where the line is to be drawn [between private and other materials] -- an intractable issue." (Id. at 149) Because of the problems of definition, Mr. Nixon says, the inquiry by the archivists must be quite detailed and the invasion to his privacy extensive.

None of these assumptions is correct.

A. Mr. Nixon Does Not Own the Materials at Issue.

The problem of ownership was not ruled upon by the court below which did not feel it was crucial to the validity of the Act. As the Reporters Committee brief indicates, the materials at issue have always been the property of the United States government. To summarize the legal principles involved:

(1) The United States government, as the employer of Mr. Nixon, has the right to all the materials created by him within the scope of his employment. Scherr v. Universal Match Corp., 417 F.2d 497, 500 (2d Cir. 1969), cert. denied, 397 U.S. 936 (1970); United States v. First Trust Co. of St. Paul, 251 F.2d 686, 688 (8th Cir. 1958); Public Affairs Associates v. Rickover, 268 F.Supp. 444, 448 (D.D.C. 1967); Sawyer v. Crowell Publishing Co., 46 F.Supp. 471, 473 (S.D.N.Y. 1942), aff'd, 142 F.2d 497 (2d Cir. 1944), cert. denied, 323 U.S. 735 (1944).

(2) These rules of law apply to the President as well as any other government official. The President holds office bound by the laws and the Constitution. He derives his power from the people who alone are sovereign. To grant the President the right to walk away with every document generated by the White House during his term of office is to grant him a prerogative inconsistent with the spirit of our government and beyond the right of every other public official.

(3) Personal ownership of presidential materials is contrary to the needs of government. Nothing could be more absurd than having a new President enter office not knowing

what his predecessor had done in certain vital areas and placing him in the role of a supplicant to a private citizen to discover the true state of affairs. See Affidavit of Paul Henry Nitze (App. 306); Affidavit of Morton H. Halperin (App. 311); Affidavit of John S.D. Eisenhower, (App. 188). See also the "Public Documents Act," Hearings Before the Subcommittee on Printing, Committee on House Administration, on H.R. 16902, House of Representatives, 93d Cong., 2d Sess. at 81; Cook, "Private Papers of Public Officials," 3 The American Archivist 299 (July, 1975); Arthur M. Schlesinger, Jr., "Who Owns a President's Papers," 27 Manuscripts 178, 181 (1975) (J.S. App. 56a).

(4) There has been no unbroken tradition of private ownership of presidential papers. (App. 488-495). In any event, a new tradition has emerged since the administrations of Herbert Hoover and Franklin D. Roosevelt. Professor Herman Kahn of Yale, upon whose statement Mr. Nixon so heavily relies (Appellant's brief at 31), said before Congress when it was considering the Act: "It is my feeling that since President Roosevelt's time it has become a part of our unwritten constitution that a President cannot do other than to immediately leave all his White House papers to the Government when he leaves the White House. All of them, immediately on departing the White House, have made their papers the property of the Federal Government." The Public Documents Act, Hearings at 95-96.

(5) The notion of private ownership of presidential materials is inconsistent with established laws on retention of federal records and their availability to the public under the Freedom of Information Act. In

1950, Congress passed the Federal Records Act broadly defining records of the United States to include all documentary and other material "made or received by an agency of the United States Government...in connection with the transaction of public business and preserved or appropriate for preservation...as evidence of the ....functions, policies, procedures, operations or other activities of the Government..." 44 U.S.C. §3301.[3] These records are regulated as to retention and disposal under specific provisions found in 44 U.S.C. §§2901-3314.

Presidential records, like those of every other official, are covered by the law. Furthermore, the Freedom of Information Act,

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3. Mr. Nixon's claim that passage of the Presidential Libraries Act of 1955 (44 U.S.C. §§2107 and 2108) recognized personal ownership of presidential materials is incorrect. (Appellant's brief at 98-99) The Presidential Libraries Act provided for federal maintenance of Presidential Libraries and provided that the President may contribute not only personal papers but also official papers dealing with other government offices he had held. Since all government officials are treated the same way by the libraries act, Mr. Nixon's argument would lead to the absurd conclusion that every governmental official owns his governmental papers. See Judge Richey's discussion in Nixon v. Sampson, 389 F.Supp. at 143-145.

passed in 1966 and amended in 1974, provides for broad public access to all government records. Many White House records are now subject to the FOIA. See 5 U.S.C. §552(e). To allow a former President to take away 42 million documents at the end of his term means that many millions of documents available to the people on January 19 of a new presidential term are taken out of the reach of the FOIA on January 21, after the inauguration of a new President. Furthermore, Mr. Nixon's claim of ownership would mean that millions of documents of a sitting President would be open to disclosure but the same documents of a former President may be barred from view. Merely to state that proposition is to show its absurdity.

(6) Even if there had been an unbroken tradition of private ownership of presidential materials, that tradition cannot have the force of law. This Court has recently rejected the legal force of the unbroken tradition of political patronage in government employment. In Elrod v. Burns, 49 L.Ed. 2d 547, 563, n.22 (1976), this Court noted:

> Partisan politics bears the imprimatur of tradition, not the Constitution. "It may be correct that the patronage system has been followed for 'almost two hundred years' and therefore was in existence when the Constitution was adopted... In any event, if the age of a pernicious practice were a sufficient reason for its continued acceptance, the constitutional attack on racial discrimination would, of course, have been doomed to failure...." Illinois State Employees Union v. Lewis, 473

F.2d 561, 568 (CA7 1972).

B. Mr. Nixon's Private Materials Are Not Within the Coverage of the Act and Will Be Returned to Him.

As noted above, the Act applies to certain documents and tape recordings that constitute the "Presidential historical materials of Richard M. Nixon," covering the period of his Presidency from January 20, 1969, through August 9, 1974. Sections 101(a) and (b).

Section 104 of the Act directs the Administrator of General Services to submit regulations regarding access to the materials. The regulations are to provide for public access to records relating to the alleged Watergate offenses and other documents having general historical significance, but the rules must take into account "the need to protect any party's opportunity to assert any legally or constitutionally based right or privilege" and "the need to give Richard M. Nixon, or his heirs, for his sole custody and use, tape recordings and other materials which are not likely to be related to the need [to provide the full truth about Watergate] and are not otherwise of general historical significance." Sections 104(a)(5), (7).

Mr. Nixon asserts that the materials under the custody of the Court also include personal notes from his daughters, communications with his wife, and his diaries.[4] However, these materials are not covered by the

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4. Appellant's brief at 145-49.

Act and have no relevance to the questions of whether the Act is constitutional.

The Act applies only to "Presidential historical materials." Mr. Nixon argues that since Section 101(b)(2) refers to the definition of "historical materials" in the Presidential Libraries Act, 44 U.S.C. §2101, Congress has retained governmental custody over every paper and effect he produced or received during his term in office. (Appellant's brief at 33) This argument is simply an attempt to stretch the coverage of the Act far enough to give Mr. Nixon a target for his otherwise meritless claims. Mr. Nixon does not correctly characterize the intent of Congress since he ignores the most significant word in Section 101(b)(1): "Presidential." Although the term "historical materials" is broadly defined in the Presidential Libraries Act, that statute authorizes governmental acceptance of materials from a former President for placement in a library. The present legislation, however, authorizes retention of materials (without regard to the wishes of the former President) and therefore appends "Presidential" to that formulation, so as to retain only those documents related to appellant's presidential role, rather than his roles as father, husband, client, patient or private citizen.

Mr. Nixon's argument is further refuted by Section 104(a)(7) of the Act, which directs the Administrator of General Services to return to Mr. Nixon (for his sole custody and use) records which are not likely to be related to the need to provide the full truth about the alleged Watergate abuses and are not otherwise of general historical significance. The clear purpose of this provision

is to protect Mr. Nixon's interest in personal and nongovernmental materials. The legislative history of the Act makes it plain that Congress was concerned about the preservation and availability of documents relating to governmental affairs and to insure that they were not destroyed pursuant to the Nixon-Sampson agreement. There is no indication whatsoever in the history that the statute was intended to apply to family matters, doctor-patient consultations and the like. It would be surprising indeed for Congress to enact a statute applicable to the personal notes that Mr. Nixon's daughters left for him in his office or residence, and there is no reason for this Court to accept Mr. Nixon's tortured reading of the Act.

C. Mr. Nixon's Complaints About the Act May Be Solved By the Regulations.

Mr. Nixon disputes the finding of the court below that subsequent regulations may solve all of his constitutional complaints and therefore the only immediate impact of the law is to provide for archival review and processing of the materials. Mr. Nixon argues that the law has the following immediate effects:

> [1] all the materials are immediately sequestered, [2] Mr. Nixon's access to them is burdened both by their physical removal and by individualized pre-access paperwork requirements, [3] executive officials in future administrations are granted ready access to them, [4] the burden of claiming and proving presidential privilege is shifted to the former President,

> [5] access to private parties by subpoena is facilitated, and [6] the Administrator is not obliged by any statutory command to take account of the policy of confidentiality in determining how to treat the materials while he is reviewing them or in drafting and issuing his "public access" regulations. (Appellant's brief at 44)

None of these arguments carries any substantial weight. At the very least, Congress could require that the Administrator, who was lawfully in possession of the materials before the Act was passed, retain such possession in Washington until the validity of the Act was determined. The court below rested its decision in part upon the validity of the Congressional finding that Mr. Nixon was an unreliable custodian of the materials. (J.S. App. 47a-50a, 96a) That determination surely is sufficient to justify, at the least, temporary retention by the Administrator.

Pursuant to 41 C.F.R. §105-63.301, Mr. Nixon "shall at all times have access" to the materials. Another regulation, 41 C.F.R. §105-63.206(l), requires all persons seeking access to document his reasons for doing so. This latter provision is designed to protect Mr. Nixon by requiring others to show their justification for access, not to put roadblocks in the way of Mr. Nixon's unrestricted right to look at the materials. Once again, Mr. Nixon seeks to create problems where none exist.

The third argument is among the best reasons for upholding the Act, not for invalidating it. There is simply no reason why a

successor administration should not have access to government records it needs to accomplish its task. President Ford in his donation of presidential papers to the United States explicitly permitted unrestricted access to them by the new administration -- a recognition of the governmental needs involved. See 12 Weekly Compilation of Presidential Documents 1713 (December 20, 1976). The problem of access to political records is discussed below at Point III; and private records are to be returned to Mr. Nixon.

Mr. Nixon argues that the materials may be more available to judicial subpoenas as a result of the fact that he is not their custodian. However, the statute makes clear that Mr. Nixon may cite against any subpoena any right, defense or privilege available to him under the Constitution or federal law. Section 102 (b). Mr. Nixon claims that he will be treated as an intervenor and may have to overcome "procedural hurdles" to assert his rights. (Appellant's brief at 38) Once again he raises a hypothetical horror which has no basis in reality. Mr. Nixon's lawyers have vigorously asserted his rights in every reported case where a subpoena was served for access to his materials. See, e.g., Halperin v. Kissinger, C.A. No. 1187-73 (D.D.C. December 16, 1976) 401 F.Supp. 272 (D.D.C. 1975); Dellums v. Powell, Docket No. 76-1336 (D.C. Cir. January 28, 1977); Sun Oil Co. v. United States, 514 F.2d 1020 (Ct. Cl. 1975). In no case cited by him did he suffer any procedural handicaps. He may have lost on the merits, but this was not because the Administrator had custody of the materials rather than himself.

Furthermore, there is nothing in the opinions of those courts upholding a subpoena that indicates that as a result of the Act, the legal rules on presidential privilege have changed in any way. The lower courts simply found, just as the court below did, that whatever privilege Mr. Nixon could claim, it was of less force than a sitting President could assert and those seeking the subpoena had proved their need to access. Mr. Nixon is engaging in totally circular reasoning here. He claims the Act is invalid because other courts had held against his claim of presidential privilege. He argues that since his claim of privilege was obviously valid, the courts must have been influenced by the Act to hold as they did and therefore the Act must be held unconstitutional for undermining his privilege. On the contrary, the proper approach must be that the courts were correct in not upholding his claim of privilege. Thus, Mr. Nixon has even less legal basis for seeking to invalidate the Act.

Mr. Nixon's final argument on the immediate impact of the Act is that there are no procedures mandated for protecting presidential privilege in reviewing the materials. Once again, the simple answer is that an ex-President has no privilege to assert. But even if he did, the Act allows him to assert "any legally or constitutionally based right or privilege which would prevent or otherwise limit access" to the materials. Section 104 (a)(5). If he thinks the regulations will somehow inhibit his ability to assert those rights, his complaint is premature since no regulations have been adopted and approved by Congress. Once the regulations have come into force (and before any examination of the

materials will be made) Mr. Nixon has the right to go into court to challenge them. If his argument reduces itself to the fact that ultimately some screening of the materials will take place by archivists -- a point accepted by the court below -- the extent of the invasion of presidential privilege is minor, given the limited nature of that privilege -- if it exists at all -- when asserted by a former holder of the office.

Finally, Mr. Nixon asserts that this Court should consider the Act in terms of the three sets of regulations drafted by GSA. He claims that it is "virtually a certainty" that protective regulations will not be issued and therefore this Court should accept the fact that broad public access to the most sensitive materials will occur. (Appellant's brief at 48) In support of this position, Mr. Nixon cites the Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) and Buckley v. Valeo, 424 U.S. 1 (1976). Once again, his reliance is misplaced.

The two cases cited merely stand for the proposition that once a legislative command is clear, it is not necessary for the final administrative event to occur before a challenge to that command can be made. If the final regulations or administrative act are mandated by the underlying law and cannot be other than what the law commands, the court can consider the validity of the law before that final administrative step is taken.

In the Regional Rail Reorganization Act Cases, a Special Court set up under the Rail Act was obliged to order conveyance of the rail properties covered by the Act to Conrail. Although the Special Court had not yet acted,

the conveyance in question was sure to occur. This Court said: "When the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justifiable controversy that there will be a time delay before the disputed provisions will come into effect." 419 U.S. at 143.

Similarly, in Buckley v. Valeo, the method of choosing the members of the Federal Election Commission was one of the issues presented to this Court. Although it had not yet exercised all of its functions under the Federal Election Campaign Act, the Commission had issued rules and regulations under its statutory authority. This Court held that the legal challenge to the structure of the Commission was ripe for review and the exercise of its other powers was "certain." Therefore, the validity of the selection process of the Commission could be determined. 424 U.S. at 116.

In this case there is no such inevitability or certainty. We still do not have final regulations. This is not a situation where the regulations are themselves dictated by the Act and their final form is certain. There is considerable discretion in the Administrator and the court below suggested broad approaches that the final regulations should take. The only certainty here is that professional archivists will review the material in order to make the classifications finally mandated by the Act and regulations. Thus, the only inevitable invasion of Mr. Nixon's interests is through the screening process discussed at length in the decision below. And no right of Mr. Nixon is sufficiently threatened by that process to warrant any relief in

this case.

D. The Distinction Between Private Materials and Government Materials Can Readily Be Made.

Mr. Nixon argues that the dividing line between what is personal and what is governmental is an "intractable issue." (Appellant's brief at 149). Thus, extensive review of his private materials by GSA officials will be necessary and the invasion of his privacy will be overwhelming as hundreds of archivists pore over his records to determine into which category the documents belong. He presents a series of hypothetical problems as to whether personal conversations with his wife and family or his dictabelt diaries could be considered governmental records.

But the problem of dividing personal and governmental records has existed for every other official of government. As individuals leave government employ, they are reminded of specific regulations that require them to leave all official records behind them. In addition, archivists in Presidential libraries must review millions of documents to determine into which category specific documents fit, or whether they should be made available to the public because they might embarrass a living individual. See Affidavit of Daniel J. Reed (App. 265-67). Thus the problem of definition and archival review is frequently met and solved.

Title 44, Section 3301 contains the basic definition of government records. (See p. supra.) That definition is supplemented by regulations published at 41 C.F.R. §101-11.

202-2.[5] These regulations require each government official to clearly designate his

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5. §101-11.202-2 Documentation standards.
To insure that adequate and proper records are made and preserved in the Federal Government, the following documentation standards will apply in each Federal agency:
(a) The record of the transaction of public business by any Federal official or employee is to be complete to the extent required (1) to facilitate informal action by the incumbemts and their successors in office; (2) to make possible a proper scrutiny by the Congress, other duly authorized agencies of the Government, and other persons properly and directly concerned, of the manner in which public business has been discharged; and (3) to protect the financial, legal, and other rights of the Government and of persons affected by the Government's actions.
(b) With particular regard to the formulation and execution of basic Government policy, Federal officials are responsible for invorporating in the records of their agencies all essential information on their major actions. Significant decisions and commitments reached orally (person to person, by telephone, or in conference) should be reduced to writing and included in the record. Minutes should be taken at important board, committee, and staff meetings, and these, together with a copy of the agenda and all documents considered at or resulting from such meetings, should be made a part of the record.
(c) The programs, policies, and proce-

personal records as non-official and to file them separately. These regulations requiring segregation of governmental records from private records went into effect on December 8, 1964 (29 F.R. 16807) and were in force during Mr. Nixon's entire term of office.

To remind government officials of the requirements of law, James B. Rhoads, Archivist of the United States, published a notice in the Federal Register on November 19, 1976, pointing out the various definitions and reminding agency heads of their obligations to monitor compliance. 41 Fed. Reg. 51149 (November 19, 1976).

Furthermore, on November 30, 1976, Counsel to the President Philip W. Buchen sent a memorandum to the White House Staff telling

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dures of Federal agencies are to be adequately documented in appropriate directives. A record copy of each such directive (including those superseded) will be maintained as a part of the official files.
(d) Papers of a private or nonofficial character which pertain only to an individual's personal affairs that are kept in the office of a Federal official will be clearly designated by him as nonofficial and will at all times be filed separately from the official records of his office. In cases where matters requiring the transaction of official business are received in private personal correspondence, the portion of such correspondence that pertains to official business will be extracted and made a part of the official files (see §101-11.406-6).

them of their obligations to return all official records before they left:

> Purely personal files and materials, including original documents, may be taken by the departing staff member. Such files include correspondence unrelated to any official or campaign duties performed by the staff member: daily appointment records and telephone logs....copies of records of a personal nature relating to a person's employment or service; and personal copies of photographs, proclamations, commissions or similar commemorative items. Personal files do not include any copies, drafts or working papers that relate to official business or the campaign. Memorandum for the White House Staff, by Philip W. Buchen, dated November 30, 1976, p.2.

These regulations and memoranda indicate that there is a solution for the "intractable issue" presented by Mr. Nixon for every other official in government. As noted above, the Act requires retention of only Mr. Nixon's governmental records, exactly the same problem to which the directives noted above are addressed. If the problem of definition is routinely solved for every other official, it can be solved for Mr. Nixon as well. Granted an ex-President has accumulated far more materials. He may also have different problems concerning his role as head of a political party. (See discussion below in Point III). But the rhetorical questions asked by Mr. Nixon are easily answered in accordance with the definitions noted above. If there are some documents which do not clearly fall in

one category or another, that argues for more professional input rather than less, as the discussion below indicates.

An illustration of the weakness of Mr. Nixon's argument can be shown by the recent controversy over former Secretary of State Henry A. Kissinger's stenographic records of his telephone conversations. When Mr. Kissinger donated his government records to the Library of Congress he omitted his recorded telephone conversations, claiming that these records were private and he could keep them as his own. He did so on the basis of a legal memorandum prepared by the Legal Adviser, Department of State. (See Appellant's brief at 131). However, Dr. Rhoads took issue with Mr. Kissinger. In a letter to Mr. Kissinger dated January 4, 1977, Dr. Rhoads wrote that he was responsible for ascertaining that all federal agencies maintain and dispose of their records in an efficient and lawful manner, and that they preserve records of historical value. He requested that a team of trained archivists examine the transcripts. "I believe these statutory authorities and responsibilities require that I conduct an inspection of the documentary materials mentioned above to verify the conclusions made and actions taken concerning them." Letter, James B. Rhoads to Henry A. Kissinger, January 4, 1977, p.1. A memorandum from the Congressional Research Service of the Library of Congress, dated January 19, 1977, concluded that the stenographic records were governmental rather than private: "If [State Department] regulations permit monitoring [of phone calls] only when deemed 'absolutely necessary for the conduct of business,' then the conversations must have been part of the official duties of the Secretary of State." Memorandum

of Congressional Research Service, Library of Congress, American Law Division, dated January 19, 1977, p.5.

Thereafter, the General Counsel of GSA prepared a memorandum for Dr. Rhoads, confirming that he had the authority to require inspection of the Kissinger transcripts by trained archivists. "The Archivist of the United States has the authority and the responsibility to make an independent determination of the character (federal records, Nixon historical materials or personal papers) of the telephone transcripts...." Memorandum, Donald P. Young to James B. Rhoads, dated February 3, 1977, re Archival Inspection of Kissinger Telephone Transcripts, p.2. The General Counsel outlined the various definitions to be applied in this situation and concluded: "...it is the very existence of a 'gray area' that argues so strongly for the input of professional archivists in the decision-making process." Ibid. at 5. He also discussed the issue of privacy: "While conceding the possibility of some invasion of the privacy of Dr. Kissinger or certain of the persons with whom he was speaking, we believe this threat is far outweighed by the public interest served by archival inspection." Ibid. at 11.

In the middle of the controversy, Dr. Kissinger donated the materials in question to the Library of Congress, but he imposed strict restrictions on access to those materials. A Freedom of Information Act suit has now been filed to secure access to these materials and to determine whether they are private or public. Reporters Committee for Freedom of the Press v. Vance, C.A. No. 77-0220 (D.D.C. 1977).

The controversy is important for the purposes of this suit for the following reasons:

(1) Dr. Rhoads' request for access to the materials to determine whether they were public or private is precisely what the Act involved here specifies. Trained archivists must look at the materials at issue if they are to make the judgments required under the law.

(2) The definitional problems can be solved by reference to the key statutory and regulatory provisions noted above. The same provisions apply to the Nixon materials and the Kissinger materials.

(3) Mr. Nixon argues that his claim of privacy requires that no access be allowed by trained archivists even to determine whether the privacy claim is valid or not. In other words, he is arguing that merely to assert that certain records are private is to prevail on that claim, since even the minimal inquiry by an archivist would violate his privacy. But the Kissinger case shows that some inquiry is necessary -- if not by Dr. Rhoads or his subordinates, then by the district court in the FOIA claim. The law could not be otherwise.

POINT II

MR. NIXON'S FOURTH AMENDMENT RIGHTS ARE NOT VIOLATED BY THE ACT

A. Mr. Nixon Had no Reasonable Expectation of Privacy with Respect to His Presidential Papers.

The court below and all the parties seem to agree that the touchstone of Fourth Amendment protection is a person's reasonable expectation of privacy.

The court below found that since Mr. Nixon saw no more than 200,000 documents, his reasonable expectation of privacy in all but a small amount of the materials was nonexistent. As the court said: "If plaintiff himself saw no more than 200,000 documents, we find it difficult to believe that more than a tiny fraction of them contain materials which Mr. Nixon reasonably expected to be private." (J.S. App. 69a)[6] This is because a person

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6. At a later point in the opinion, the lower court suggested that Mr. Nixon had a reasonable expectation of privacy in his personal records: "...if other private materials were not excluded from review in the past, that might demonstrate little more than that past Presidents chose not to protect fully their privacy rights, a choice not necessarily binding upon Mr. Nixon....we believe that the manner in which such materials [i.e., private materials] have been treated by past Presidents ...gave rise to a legitimate expectation on Mr. Nixon's part that not all of the materials would be subject to comprehensive review by government personnel without his consent." (J.S. App. 73a-75a) The court further noted: "...we believe that plaintiff's reasonable expectation of privacy is adequately established by the practice of de facto control of presidential materials by former Presidents." (J.S. App. 74a, n.55.) In the context of the court's discussion it clearly meant that Mr. Nixon had a reasonable expectation of privacy in his personal and private materials.

can hardly have a reasonable expectation of privacy in materials he never saw. Furthermore, insofar as the materials reflect the activities of executive department officials reporting to each other, any expectation of privacy disappears in the exposure to executive branch members in the chain of command. (J.S. App. 69a)

As for the tape recordings and the 200,000 documents which Mr. Nixon reviewed or wrote, he had no reasonable expectation of privacy in materials that constituted the exercise of Presidential power. Even if they are not owned by the United States, everyone (except Mr. Nixon) seems to agree that they are affected with a public interest or infused with a public trust (J.S. App. 70a) that created an expectation that they would be donated back to the United States, just as former President Ford has recently done. That tradition, discussed by Professor Herman Kahn above, undercuts the basis for a Fourth Amendment claim by Mr. Nixon.

More important, there is no reasonable expectation of privacy by any public official with respect to the exercise of his governmental powers. This Court said in Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280, 284 (1968), that the state could demand "an accounting of their [the state employees] use or abuse of their public trust" and they could be questioned "relating to the performance of their official duties on pain of dismissal from public employment." 392 U.S. at 284. In Lefkowitz

v. Turley, 414 U.S. 70, 80 (1973), this Court noted that a public employee "could be discharged for refusing to answer questions about the performance of his official duties."

These cases must mean that no government official has a reasonable expectation of privacy with respect to materials reflecting the exercise of his official duties. If he can be fired for refusing to give an account of his office, he cannot have Fourth Amendment protection to resist an inquiry into the use of his powers. The Fifth Amendment does not apply to this case since Mr. Nixon has been pardoned and cannot be prosecuted for anything found in the materials. Since one of the prime purposes of the legislation is to discover the full truth about Watergate, Congress could legitimately require that the 200,000 documents and the tapes be reviewed to discover what they show about Mr. Nixon's responsibility for the abuses of power identified under the generic term of "Watergate."

As to those documents and tapes not involving Watergate but related to other exercises of presidential power, Mr. Nixon still does not have any reasonable expectation of privacy. The cases cited above clearly provide that any inquiry into the performance of public duties is not barred by the Fourth Amendment on the grounds that a public official can consider his official actions as private. In addition, Congress amended the Freedom of Information Act in 1974 to make clear that documents of the Executive Office of the President were subject to disclosure under the FOIA. P.L. 93-502, 88 Stat. 1561 (November 21, 1974). In 1971, the District of Columbia Circuit had held that the Office of Science and Tehcnology, part of the Executive Office of the President, was an agency of the government subject to the FOIA. Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971). Congress considered that conclusion the correct interpretation of the law and formalized it in the 1974 amendments, adding 5 U.S.C. §552(e) which defines agency as including the Executive Office of the President. The Conference Report to the 1974 amendments states:

> With respect to the meaning of the term "Executive Office of the President" the conferees intend the result reached in Soucie v. David ...The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President. Freedom of Information Act and Amendments of 1974, Source Book, House Committee on Government Operations, 94th Cong., 1st Sess. (1975) at 232.

The legislative development of the FOIA is relevant in the instant action for the following reasons:

(1) There was never any reasonable expectation of privacy with respect to agency records within the Executive Office of the White House since they had been subject to the FOIA from the beginning. (2) Congress could legislate retroactively to make available executive department records which, at the time they were created, were not considered subject to disclosre. Thus, although the FOIA was passed in 1966, documents from before that date are routinely made available under the act. The government official

creating the document or about whom it is written, will not be heard to say that at the time he created it, he did not believe it was subject to disclosure and therefore he had a reasonable expectation of privacy with respect to its contents. Similarly, the courts regularly apply the 1974 amendments to documents created before that date without considering any problems of retroactivity or a "reasonable expectation of privacy" by the government official whose activities may be revealed in the documents requested. See, e.g., Kruh v. General Services Administration, 421 F. Supp. 965 (E.D.N.Y. 1976); Weissman v. Central Intelligence Agency, Docket No. 76-1566 (D.C. Cir. January 7, 1977).

(3) In the same way that Congress amended the FOIA on November 21, 1974, to make a broader range of documents available to the public, it could lay the basis for futher disclosure in December, 1974, by passing the Act in question here. Whatever else might be said about the Act, it cannot be seriously argued that Mr. Nixon can attack its validity because he did not think Congress would provide for more public access to governmental records than was in force at the time he left office. If he can assert any presidential privilege in accordance with United States v. Nixon, 418 U.S. 683 (1974) -- a point we vigorously dispute -- that right can be asserted at any time. But he cannot argue that although he does not have any presidential privilege, he thought he did and therefore he has a Fourth Amendment right to resist disclosure because of his reasonable expectation of privacy.

In short, there is not a word in any of the legislative history of the FOIA or in the

cases interpreting it that the government officials whose records were made available under the Act had any Fourth Amendment rights to resist disclosure because they reasonably expected Congress to keep their records secret.

In addition, the Act as such does not mandate disclosure of any particular document. In the same way that Congress could broadly make all Executive Office documents subject to the FOIA and then exempt many of them from disclosure under exemption 5 [5 U.S.C. §552 (b)(5)], Congress could require retention of all presidential materials to prevent their destruction but protect any constitutionally based privilege through specific exemptions from public disclosure. It may well be, as the parties upholding the Act have argued from the beginning, that the regulations will preserve whatever privilege, if any, an ex-President may assert. Thus, if he has any expectation of privacy in certain immediate staff documents (which we do not believe would be reasonable in any event) that expectation may finally be fulfilled when the regulations are issued.

B. Mr. Nixon's Reasonable Expectation of Privacy in His Personal and Private Papers Will be Respected.

The only Fourth Amendment issue that concerned the court below related to Mr. Nixon's reasonable expectation of privacy in his private papers and his tapes. We agree that Mr. Nixon is protected by the Fourth Amendment with respect to his diaries or his personal conversations or communications with his wife and family, his lawyer, minister or other intimates and friends. And the Act

recognizes those rights and requires return of these materials to him. Thus, the only issue is whether the screening and review process mandated by the Act to determine whether records are private will amount to such an unreasonable invasion of Mr. Nixon's privacy that the Act must be invalidated.

Mr. Nixon's argument reduces itself to a claim that because someone else must do the review and screening of the few private documents and conversations caught in the materials, then he must walk away with all 42 million of them. Congress could reasonably have decided that independent archivists should do the screening. They have an unblemished record of discretion in handling extremely sensitive materials. As Daniel J. Reed, an Assistant Archivist in the Office of Presidential Libraries, noted in his affidavit:

> In the course of arranging and describing presidential historical materials at these [presidential] libraries, the archivists routinely review materials of the President, his staff and his family and make determinations concerning access to them. Such documents in many instances include those of a personal or private nature, such as medical letters or personal diaries. Library archivists likewise review security classified documents on a regular basis. The archivists, because of their professional experience and training, are skilled in reviewing and segregating such materials. App. 266.

Every President since Herbert Hoover has relied upon such archivists to review their material. In fact, Mr. Nixon himself donated

a substantial portion of his pre-presidential materials to the United States as well as his Vice-presidential materials. (App. 269, 273) Each chattel deed provided that archivists should in the course of their duties "have such access to the said Materials as shall be necessary for normal archival processing activities." (App. 270, 274)

The professional archivists alone have the expertise and manpower to handle the task for sorting out so many materials. Congress could have legitimately decided that regularized procedures were necessary in view of the past history of the compromising of the materials. If there may be difficult problems of definition, that "argues so strongly for the input of professional archivists in the decision-making process," as the General Counsel of GSA has explained above.

Congress could also have reasonably concluded that the screening and review process should be done by professional archivists instead of Mr. Nixon, because it felt Mr. Nixon was not a reliable reviewer of the materials. (J.S. App. 47a-49a, 96a) Mr. Nixon is neither expert in reviewing the materials nor disinterested. Congress could legitimately have concluded that there might have been a temptation by Mr. Nixon to distort or destroy the historical record since serious charges of misconduct have been leveled against him.

In addition, Mr. Nixon has played fast and loose with the definition of what is private and what is official. Mr. Nixon has testified that he regards a memorandum from John Dean to Bud Krogh in the White House suggesting action to terminate or restrict government contracts awarded to the Brookings

Institution as a private "political" document rather than a governmental one. (Nixon Dep., App. 577; Exhibit D, App. 649) He took the position that his decision of June 23, 1972, to use the CIA to frustrate the FBI's investigation of Watergate was "political," and "to an extent personal." (Id. at 523)[7] Mr. Nixon's demonstrated reluctance to reveal materials relating to the alleged Watergate abuses and other embarrassing documents gives

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7. Three years ago, Mr. Nixon took a contrary position before this Court in United States v. Nixon. His attorney said, in response to a question from one of the Justices:

> "QUESTION: Would you automatically say that every conversation about Watergate is in the course of the performance of the duties of the President of the United States?
>
> "MR. ST. CLAIR: I would think it would be, yes, sir.
>
> "QUESTION: Why is that, Mr. St. Clair?
>
> "MR. ST. CLAIR: Because he has the duty, (a) to enforce the laws; that is, to prosecute these cases; and (b) he has to take care to see that the laws are enforced; that is, to investigate."

United States v. Nixon, 418 U.S. 683 (1974), Transcript of Argument at 84-86.

Of course, in that case it was in his interest to have the broadest definition of what is an official record, since he was urging broad protection for presidential communications on a claim of presidential privilege.

little assurance that he or his designees would objectively restrict themselves to removal of truly personal records from the presidential files. In such circumstances, the best course is clearly the one Congress has chosen -- the segregation of Mr. Nixon's personal materials from those belonging to the Government by neutral and professional archivists.

The kind of review required by the Act is similar to that approved by this Court in United States v. Nixon:

> "[W]e find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection...." 418 U.S. at 706.

If this Court were willing to approve in camera review of intimate presidential conversations of a sitting President, the careful professional screening of an ex-President's materials in the manner prescribed by the Act is surely valid.

Finally, the court below recommended a series of methods for minimizing the intrusion into Mr. Nixon's privacy, to avoid a "word-by-word" review of the private materials. (J.S. App. 29a, n.13) Part of the reason why extensive screening may be necessary is because Mr. Nixon himself commingled the private and public materials -- contrary to specific regulations referred to above, in force throughout his entire administration, which mandated separate filing of personal records. Having been responsible for the

problem that created the need for extensive archival review, Mr. Nixon could hardly be allowed to benefit thereby, since the personal materials cannot constitute more than a tiny fraction of the 42 million documents. In short, Mr. Nixon's argument comes down to a claim that because some of the 200,000 documents and the taped conversations are not clearly public or clearly private, the archivists must examine the doubtful materials in detail to determine their proper character. On that basis, Mr. Nixon claims entitlement to all 42 million documents.

This analysis leads to the conclusion that there is no "general search" involved by operation of the Act. Mr. Nixon's reliance upon Stanford v. Texas, 379 U.S. 476 (1965), is misplaced. In that case the police seized 2,000 of the petitioner's books, pamphlets and papers, looking for allegedly pro-Communist materials. This Court held that the broad search warrant in that case permitting seizure of such large amounts of a private citizen's own papers violated the Fourth Amendment. The warrant in that case was a "general warrant" -- precisely the kind of overbroad authorization which the search and seizure clause was designed to prevent.

In this case, the Act does not seize personal papers. What is preserved by the Act are governmental records, the great bulk of which Mr. Nixon never saw, constituting the business of the Executive branch of government. Congress has the right to preserve all government records from destruction by invalidating the Nixon-Sampson agreement and making them available for the on-going business of government. Finally, the personal papers involved were not "seized" in the man-

ner involved in Stanford. They were intermingled with government records in the Nixon White House and all were left in the possession of GSA. The Administrator who is in lawful possession of the materials must now sort out the personal records and then return them to Mr. Nixon. Once again, the claims of a "general warrant" or a "general search" come down to a complaint that professional archivists and not Mr. Nixon must do the review and screening. For the reasons noted above that choice was a reasonable one.

C. The Preservation of the Tapes and Their Treatment by the Act are a Reasonable Exercise of Congressional Power.

The tape recordings of presidential conversations present special problems. Mr. Nixon's own discussions are involved, his family, his lawyers or his physicians might have talked to him in the Oval Office and had their conversations recorded, the discussions with his aides would at times be quite confidential, and certainly political conversations occurred as well. In addition, the screening and review process to separate personal from governmental is much more complex.

By the same token, the tape recordings may be the most important materials to fulfill some objectives of the Act. It is certainly the uniform opinion in this nation that it was the revelations on the tape recordings handed over in response to the subpoena upheld by this Court in United States v. Nixon, that led to the resignation of Mr. Nixon and showed the extent of his involvement in the abuses of power now known as the Watergate affair. The Watergate crisis is

one of the most severe that this nation has ever endured. Although the "nightmare" may be over, as President Ford said on taking office, the lessons that we can draw from it are still unknown. The nation still does not know how far White House officials were involved in an effort to break the law, to subvert our democratic institutions and to use governmental power secretly to keep themselves in office. If the hit-or-miss method of the Special Prosecutor was able to unearth so much material relating to the misuse of power, it is certainly reasonable for Congress to conclude that still more review is necessary to discover the full truth about the abuses of power connected with the Watergate affair.

Thus, the first purpose of the law, as noted in the preamble, is to "protect and preserve recordings of conversations involving former President Richard M. Nixon." Since the Nixon-Sampson agreement would permit Mr. Nixon to destroy the tapes within five years -- and they would be destroyed automatically on his death and in any event after ten years -- Congress could conclude that they must be preserved in the first instance. In view of the great crisis in confidence concerning the integrity of the governmental process as a result of Watergate, Congress could also have laid the basis for public access to materials relating to Watergate.

Congress could also conclude that the documentary materials and the tapes should be preserved for use in judicial proceedings. Mr. Nixon has recently been found personally liable for damages for improperly initiating a wiretap program on government employees. Halperin v. Kissinger, C.A. No. 1187-73

(D.D.C. December 16, 1976). Some of the Nixon presidential materials were submitted in evidence in that case and some of the tape recordings previously made public were relevant in that action. Halperin v. Kissinger, Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment Against the Individual Defendants, filed July 9, 1976, at 12-13.

The District of Columbia Circuit has recently held that the plaintiffs in another action had made a sufficient showing of need for still other tapes. The court ordered a professional archivist to be appointed as a special master to review a small number of tapes to look for the information at issue. Dellums v. Powell, Docket No. 76-1336 (D.C. Cir. January 28, 1977).

Finally, there may be still other materials of general historical interest on the tapes which should also be preserved. The proposed regulations of the Administrator provide for broad protections against access if disclosure would involve a clearly unwarranted invasion of personal privacy or constitute libel or slander. Other restrictions on disclosure track the various exemptions in the FOIA. Proposed Regulation §105-63.402-2.

If Congress could take the steps noted above -- preserve and protect the tapes, lay the basis for public access to conversations about abuse of power, preserve the tapes for use in judicial proceedings, and protect the other conversations of general historical interest (subject to protections for personal privacy) -- then the only question that remains is who should do the screening to discover materials in these categories and return all others to Mr. Nixon.

It is true that ordinarily a subpoena is self-enforcing and the person to whom it is directed must himself do the screening and production. But once again, Congress could rationally conclude that professional archivists should perform this function rather than Mr. Nixon. The tapes are lawfully in the Administrator's possession. Archivists have the professional skill and experience to make the classifications required by the Act.

Mr. Nixon has already had some unfortunate experiences in dealing with the tapes -- Congress could have considered the famous eighteen and one half minute gap in one tape and the discrepancy between the transcriptions prepared by him and those prepared by the House Judiciary Committee. (See Motion of Federal Appellees to Affirm, at 23, n.14). The decision to let professional archivists review the tapes is not meant to be punishment in any way. If Congress has the right to pass legislation preserving the tapes and laying the basis for some public access to vital areas of them, it could select the most reasonable method for insuring the integrity of the tapes and that they will be classified in the most professional manner.

Finally, a screening process can be established that would minimize any intrusion into Mr. Nixon's privacy. The court below suggested three methods for avoiding word-by-word review of the materials and tapes:

(1) providing for general classifications of materials with only a cursory glance at the contents to identify private communications and separate them immediately;

(2) giving Mr. Nixon a voice in the choice of archivists;

(3) providing Mr. Nixon with administrative review of proposed classifications. (J. A. App. 29a-31a)

Similarly Judge Richey had suggested a careful two-button procedure for reviewing the tapes whereby conversations would not be initially reproduced if Mr. Nixon's representative considered them privileged or beyond the scope of the Act. (See 389 F.Supp. at 158.) Other possibilities come to mind: assuming that conversations solely among family members are presumptively private as well as conversations with his lawyers and physicians, so that word-by-word review would not take place in this area.

The point is that a variety of methods can be used to take account of Mr. Nixon's legitimate expectations of privacy with respect to his purely private conversations.

But Mr. Nixon goes further. He argues that no system devised by the mind of man can adequately protect his privacy. Before any review procedure has been finalized, he is saying that it is impossible to protect his privacy by any method and therefore the Act is unconstitutional. This Court should reject that argument and allow the Administrator and the courts considering the final regulations to attempt to deal with that issue.

POINT III

MR. NIXON'S FIRST AMENDMENT RIGHTS ARE NOT VIOLATED BY THE ACT.

Mr. Nixon further contends that the Act

violates his First Amendment rights of free speech and association. (Appellant's brief at 164-74) Mr. Nixon's claim reduces itself to four separate arguments: (1) the review and screening of Mr. Nixon's political actions as head of the Republican Party would violate his First Amendment rights; (2) possible public disclosure of his actions would inhibit his future ability to exercise his First Amendment rights; (3) the wide discretion afforded the Administrator in drawing regulations and implementing them violates his rights; (4) his personal First Amendment rights will be infringed by government review of his materials.

Taking these points in reverse order, the intervenor-appellees conceded from the start that Mr. Nixon's First Amendment rights as a citizen must be fairly protected. If Mr. Nixon belonged to the John Birch Society -- or the A.C.L.U. -- that information should not be made public, as we asserted to the court below. (J.S. App. 91a, n.65) The regulations should clearly protect that right. Since the Act recognizes the personal rights of Mr. Nixon in that regard (Section 104(a)(5), there is no basis for voiding the Act on that basis.

Mr. Nixon's argument on the wide discretion given the Administrator on access and disclosure misses the point. He cites a series of cases from Lovell v. Griffin, 303 U.S. 444 (1938), through Shuttlesworth v. Birmingham, 394 U.S. 147 (1969), which established the principle that unbridled discretion in a public official that allows him to determine whether the exercise of First Amendment rights will be permitted or not cannot be allowed. But that is not the case here at all.

Mr. Nixon has exercised his First Amendment rights already. The only discretion is whether any of these activities will be made public or will be reviewed by archivists in a certain manner. That kind of discretion can in no way affect Mr. Nixon's rights in the future, and therefore the Lovell line of cases are irrelevant.

Mr. Nixon's third argument (which was urged below) is only briefly alluded to here. (Appellant's brief at 168-69) Mr. Nixon argued below that disclosure of his previous actions or statements will make it embarrassing for him to take an inconsistent position at a later time, thus undermining his political effectiveness in the future. (J.S. App. 92a) But the court below correctly noted that this interest was too speculative. In any event, discrete review by archivists could not make that danger a real one.

Mr. Nixon's final argument relates to his role as leader of a political party. This Court recognized in Buckley v. Valeo, 424 U.S. 1 (1976), that involvement in partisan politics is closely protected by the First Amendment. With respect to the specific provisions of the Federal Election Campaign Act, this Court held that Congress could legitimately impose ceilings on individual contributions to political campaigns but could not limit independent political expenditures or fix a ceiling on personal expenditures or overall campaign spending by candidates. It also held that broad reporting and disclosing provisions aimed at reducing corruption were not facially unconstitutional, unless they infringed on the kind of associational privacy rights recognized by NAACP v. Alabama, 357 U.S. 449 (1958). In other words,

this Court recognized that the constitutional privilege against disclosure of contributions to partisan political activities was not absolute. There is nothing in those holdings remotely applicable to the situation here.

Furthermore, this Court's decision in Buckley shows that Mr. Nixon's complaints against the Act are premature. The Federal Election Campaign Act contained a provision requiring every political committee to keep records of every person making a political contribution above $10, but the committees were obliged to report only those persons making contributions above $100. The Federal Election Commission was authorized to inspect the lists of persons contributing between $10 and $100, but there was nothing in the act authorizing disclosure by the Commission of the persons in that category. This Court refused to pass on any alleged First Amendment problems concerning possible disclosure of persons making comparatively low-level contributions:

> We agree with the Court of Appeals that there is no warrant for assuming that public disclosure of contributions between $10 and $100 is authorized by the Act. Accordingly we do not reach the question whether information concerning gifts of this size can be made available to the public without trespassing impermissibly on First Amendment rights. 424 U.S. at 84.

Similarly in this case there is no warrant for assuming that public disclosure of any of Mr. Nixon's strictly political activities is authorized by the Act.

Nevertheless we recognize that some of Mr. Nixon's activities with respect to the Republican Party in the period covered by the materials may deserve protection. If documents or tapes discuss Mr. Nixon's position on where the Republican Party should hold its convention, they might be covered by the "constitutionally based right or privilege" which would limit access to the materials under Section 104(a)(5). On the other hand, a recommendation to the President that a certain person be appointed to a federal post because of his contributions to the party involves the exercise of Presidential and not party power.

Mr. Nixon's concern that information on Republican Party activities might be exploited by a successor administration was not shared by President Ford, who donated all his political papers to the United States with no extraordinary restrictions on access to those materials. Those documents relating to his "candidacy for" any public office and "to my other political and public activities" are covered by the donation agreement, 12 Weekly Compilation of Presidential Documents 1711 (December 20, 1976), and these political documents are not considered restricted materials. (Ibid. 1713)

It is also important to recognize that the Act promotes the high public purpose of the First Amendment -- to promote free public discussion of governmental affairs. Public debate must not only be unfettered, it must also be informed. The First Amendment guarantees a free flow of information to the people concerning public officials and protects the right of the people to receive as

well as to express ideas and information.[8] As this Court stated in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969), the "right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences...may not constitutionally be abridged...." The goal of the First Amendment is "producing an informed public capable of conducting its own affairs...." Id. at 392; see also, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 496 (1975).

Mr. Nixon weighs in the balance against these vital considerations what is at best a sheerly speculative argument. He suggests that the statute penalizes his past speech by disclosing it, since disclosure will curtail his ability to speak and associate freely. But public disclosure is not required by the Act and access by archivists does not infringe any significant First Amendment right.

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8. Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Lamont v. Postmaster General, 381 U.S. 301, 307 (1965).

CONCLUSION

For the reasons stated above the judgment of the district court should be affirmed.

Respectfully submitted,

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